MODIFIED: January 31, 3012

# MISSOURI COURT OF APPEALS
# WESTERN DISTRICT

**THOMAS ABBOTT, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES ABBOTT**

**APPELLANT,**

**v.**

**EPIC LANDSCAPE PRODUCTIONS, L.C., ET AL.**

**RESPONDENTS.**

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DOCKET NUMBER WD72867
**MISSOURI COURT OF APPEALS**
**WESTERN DISTRICT**

DATE: September 20, 2011

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Appeal From:

Jackson County Circuit Court
The Honorable Charles Emmert Atwell, Judge

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Appellate Judges:

Division Two: James M. Smart, Jr., P.J., Mark D. Pfeiffer and Cynthia L. Martin, JJ.

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Attorneys:

Richard J. Zalasky, St. Louis, MO, for **appellant**.

Paul Christian Hamill, St. Louis, MO, and Joseph Jay Roper and John Michael Brigg, Kansas City, MO, for **respondents**.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS**
**WESTERN DISTRICT**

**THOMAS ABBOTT, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES ABBOTT,**

**APPELLANT,**

**v.**

**EPIC LANDSCAPE PRODUCTIONS, L.C., ET AL.,**

**RESPONDENTS.**

No. WD72867 Jackson County

Before Division Two: James M. Smart, Jr., P.J., Mark D. Pfeiffer and Cynthia L. Martin, JJ.

On January 23, 2007, Charles Abbott fell on an icy patch in the parking lot of the Fountainhead apartment complex located in Kansas City, Missouri. As a result of the fall, he suffered injuries to his leg, which eventually led to his leg being amputated.

Abbott was a resident at the apartment complex pursuant to a lease that he had signed on June 30, 2006, which identified the parties to the agreement as "Fountainhead Acquisition Corp. D.B.A. Fountainhead Apartments," landlord, and Abbott, tenant. The lease included an exculpatory clause releasing the landlord and its agents from any liability due to its negligence. While "Fountainhead Acquisition Corp." was listed as the landlord on the lease, it was not, in fact, the landlord of the apartment complex at the time the lease was signed by Abbott. On January 1, 2001, Respondent Fountainhead Refunding, L.L.C. (“Fountainhead”) acquired the apartment complex from Fountainhead Acquisition Corp. ("Acquisition"), the previous owner. At the time Abbott signed the lease, Fountainhead was the true owner.

Epic Landscaping Productions, L.C. ("Epic") entered into an oral contract with Fountainhead to provide snow maintenance services at the apartment complex in January of 2007. The contract required Epic to treat, without Fountainhead's prior approval, the parking lot at the complex upon the "trigger event" of snow accumulation of two inches or more. On this "trigger event," Epic was to push the snow from the drive lanes and parking stalls of the complex parking lots and then treat the same area with salt. Any other snow maintenance performed by Epic, outside a "trigger event" of an accumulation of two inches or more of snowfall, required the prior authorization of Fountainhead.

On January 20, 2007, the Kansas City area experienced freezing fog and a snowfall of greater than two inches. This triggered the snow maintenance services of Epic at the apartment complex on January 21, 2007. No other "trigger" events occurred between the time Epic last performed its services at the apartment complex and the time that Abbott fell on January 23rd and Fountainhead never requested any additional services.

Abbott filed the current suit on December 5, 2008. Fountainhead filed a motion to dismiss based on the exculpatory language included in the lease Abbott signed. Subsequently, Epic filed a motion for summary judgment against Abbott asserting that it owed no duty of care to Abbott on the date of his fall. The trial court granted both motions pursuant to nunc pro tunc judgments on September 1, 2010. Abbott appeals.

**AFFIRMED IN PART; REVERSED IN PART; REMANDED**

**Division Two holds:** Abbott's first three points on appeal addressing the trial court's grant of Fountainhead's Motion to Dismiss raise issues never originally presented to the trial court and will be reviewed for plain error only. Abbott's contentions that no lease existed in the first place, either 1) because Acquisition lacked the capacity to contract or 2) because Fountainhead cannot enforce the exculpatory clause of the lease because Acquisition was the named landlord, are without merit because Abbott judicially admitted to the trial court that he had entered into the lease with Fountainhead. Furthermore, the exculpatory clause in the lease Abbott signed uses what could reasonably be considered "clear, unambiguous, unmistakable, and conspicuous language" to release Fountainhead from its own future negligence. Therefore, the trial court did not commit any plain, obvious error in regarding the lease as presumptively enforceable and granting Fountainhead's Motion to Dismiss.

The trial court did err, however, in granting Epic's Motion for Summary Judgment. While the court held that on the day of the injury Epic owed no duty to Abbott, as a matter of law, because Epic had no legal obligation to treat the parking lot on the day Abbott fell and it never assumed control of the parking lot, genuine issues of material fact exist as to whether Epic in fact owed Abbott a duty. Though Epic presented evidence that it fulfilled its obligations under the contract, there is a dispute of material fact related to whether Epic breached the contract with Fountainhead, and failed to exercise reasonable care in performing its work on January 21, 2007, resulting in Abbott's fall and injuries. The judgment of the trial court as to Epic is therefore reversed, and the case is remanded.

Opinion by James M. Smart, Jr., Judge September 20, 2011

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